NO. 96262-6

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION,

Petitioner,

v.

UNIVERSITY OF WASHINGTON,

And

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925

Respondents,

BRIEF OF *AMICUS CURIAE* OF SEIU STATE COUNCIL

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I. INTERESTS OF AMICI CURIAE

The interest of *Amici Curiae*, Washington State Labor Council; Washington Federation of State Employees; SEIU Washington State Council; Washington Education Association; Teamsters Local 117; King County, Washington; and AFT Washington (collectively, "Unions") are fully set forth in the Motion for Leave to File Brief of Amici Curiae filed herewith.

II. INTRODUCTION

Petitioner Freedom Foundation ("Foundation") seeks public disclosure of emails and records regarding faculty members' and Respondent Service Employees International Union Local 925's ("SEIU 925" or "SEIU") efforts to organize a union at Respondent University of Washington ("UW"). Those emails and records are not "public records" under the Public Records Act ("PRA") because they do not relate to the conduct of government or the performance of government functions, which is evidenced in part by the fact they were not created within the scope of the faculty members' employment. Communications regarding early stages of union organizing where a union is not certified or recognized by an employer differ from communications as part of the labor relations process between a certified, recognized union and an employer; the former concern inherently personal and private conduct and

necessarily do not implicate a public employer or the conduct of government, whereas the latter may be public records when they concern the function of a government entity and its interactions with its workforce. The documents in this case fall into the former category.

In addition, the definition of "public record" in the PRA must be viewed through the lens of constitutional privacy. Private communications sent amongst employees about their desires to form a union are sent with a reasonable expectation of privacy and cannot be disclosed without infringing on those employees constitutional privacy rights. Further, disclosure may not be permitted to the extent that the emails contain personal information about public employees, disclosure of which would violate their constitutional privacy rights.

This Court should affirm the Court of Appeals' decision to enjoin the release of the documents at issue to Petitioner Freedom Foundation.

III. STATEMENT OF THE CASE

Amici Curiae adopt Respondent SEIU 925's Statement of the Case.

IV. ARGUMENT

A. Documents Regarding Employee Organizing Efforts Are Not Public Records and Fall Outside the Scope of the PRA.

1. Only Documents Related to the Conduct of Government Are "Public Records" Subject to Disclosure.

Under the PRA, a document is a public record subject to disclosure only when it is: "(1) a writing (2) relating to the conduct of government or the performance of government functions that is (3) prepared, owned, used, or retained by a state or local agency." *Nissen v. Pierce County*, 183 Wn.2d 863, 879, 357 P.3d 45 (2015) (internal citations omitted); *see also* RCW 42.56.010(3).

Only information prepared, owned, used or retained within the scope of employment qualifies as a public record. *Id.* at 878. Thus, communications undertaken by a public employee are only public records "when the job requires [them], the employer directs [them], or [they] [further] the employer's interests." *Id.* at 878-879. This is because it is only when employees are acting within the scope of their employment that their actions are "tantamount to the actions of [the public body] itself," triggering a valid public interest in their documents and communications. *Nissen*, 183 Wn.2d at 876 (citing cases).

"[R]ecords an employee maintains in a personal capacity will not qualify as public records, even if they refer to, comment on, or mention the employer's public duties." *Id.* at 881, fn. 8. For example, conversations with a spouse, discussion of one's job on social media, or records created for purely private use like a diary are not created within the scope of employment. *Id.* at 879. Such records are not "prepared,

owned, used, or retained by" the employer agency and are therefore not "public records" subject to disclosure. *Id.*

In contrast, "when an employee acts within the scope of his or her employment, the employee's actions are tantamount to the actions of the [governmental body] itself," and any resulting documents qualify as a public record. *Id.* at 876; *see also Kitsap County Prosecuting Atty's Guild v. Kitsap Cty.*, 156 Wn. App. 110, 118, 231 P.3d 219 (2010) (PRA ensures government accountability "by providing full access to information *concerning the conduct of government*"). A document is most likely to contain content relating to the conduct of government or the performance of government functions when a public employee prepares it on his employer's behalf, at its direction, or in its interest.[1]

Freedom Foundation misapplies *Nissen* in arguing that the "scope of employment" test is only necessary where the disputed records on a private device or email account. *See* Foundation's Supp. Brief at 7.

[1] *See, e.g., Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 323-324, 890 P.2d 544 (1995) (official agency documents regarding fire chief's performance and termination contained content about city's "conduct in its proprietary capacity"); *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 711-712, 780 P.2d 272 (1989) (courts consider "role the document plays," if any, in agency's business; survey data of municipal agencies which reflected "evidence of the knowledge obtained" for use in management of public golf courses were public records); *Concerned Ratepayers Ass'n v. PUD No. 1 of Clark Cty.*, 138 Wn.2d 950, 938 P.2d 635 (1999) ("nexus with agency's decision-making process" is a "critical inquiry" in determining public record status; "information that is reviewed, evaluated, or referred to and has an impact on an agency's decision-making process… within the parameters of the Act."); *Nissen*, 183 Wn.2d at 880-881 (emphasizing content related to governmental functions or "impact[ing] the actions, processes, and functions of government").

Nissen did not describe the applicability of the "scope of employment" test in the narrow fashion urged by the Foundation. Rather, it broadly held that, "For information to be a public record, an employee must prepare, own, use, or retain it *within the scope of employment.*" *Id.* at 878 (emphasis in original). This requirement applies universally, not just in the specific circumstance present in *Nissen,* in which the record was created on a private device. This is so because RCW 42.56.010(3) makes clear that a document is a public record *only* if it "relat[es] to the conduct of government," regardless of whether it was created using public or private property.

The flaw in the Foundation's reasoning is made clear by the Court of Appeal's decision in *Tiberino v. Spokane Cty.*, which involved emails sent by a government employee using government equipment, the content of which was private. 103 Wn. App. 680, 13 P.3d 1104 (2000). There, the Court determined that the documents at issue were public records, but only because of the fact that the employee's excessive personal use of emails was a reason for her discharge, and the emails had been printed by the County in preparation for litigation over her termination. *Id.* at 688. Absent the County's reliance on these personal emails for defending its personnel action, the Court would have found the personal emails on the County's email system were not public records.

The Foundation asserts that the Court below erred by holding that a public record must be "*created* in the scope of employment, rather than that they merely contain information relating to the conduct of government." Foundation Supp. Brf. at 12 (emphasis in original). But the Foundation fails to apprehend that an inquiry regarding whether a document was created in the scope of employment answers the question of whether the document relates to the conduct of government. It is not a new requirement – it is a means of interpreting *when* a document relates to the conduct of government.

In sum, the plain language of RCW 42.56.010(3) and Washington authority interpreting that statute make clear that messages transmitted using government-issued email accounts are *not* public records unless they relate to the conduct of government or the performance of government functions, and that messages relating solely to personal and private matters and not undertaken within the scope of employment fall outside this definition.

2. Communications Regarding Union Organizing Do Not Fall Within the PRA's Definition of "Public Records."

The documents at issue are not public records because they do not concern the conduct of government or performance of governmental or proprietary functions as required for a document to meet the statutory

definition of a public record. Such document were not crated within the scope of employment, as communications among employees regarding organizing for collective bargaining is not required by employees' jobs, is not directed by their employer, and does not further an employer interest.

To the contrary, employers lack the right to control or direct employees' attempts to organize for collective bargaining. Laws including the Public Employment Collective Bargaining Act, Chapter 41.56 RCW, and the Personnel System Reform Act, Chapter 41.80 RCW, make it an unfair labor practice for employers to interfere with or control employees' union activities. Here, RCW 41.76.050, prohibits the Employer from controlling or directing employees' union activity. RCW.41.76.050 ("It shall be an unfair labor practice for a public employer [] to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter."). *See also Yakima Police Patrolmen's Ass'n v City of Yakima*, 153 Wn. App. 541, 222 P.3d 1217 (2009) (an employer commits an "interference" violation when its conduct may reasonably be perceived by employees as a threat of reprisal or force or promise of benefit deterring them from pursuing lawful union activity). An intent or motivation to interfere is not required to show interference, nor is it necessary to show that an employee was actually threatened or that an employer had any anti-union animus. *City of Tacoma*, Decision 6793-A

(PECB, 2000). Instead, any conduct that an employee could reasonably perceive as either a threat of reprisal or force or a promise of benefit associated with their union activity amounts to an unfair labor practice. *King County*, Decision 6994-B (PECB, 2002) (analyzing RCW 41.56.140(1)(a), which uses language identical to that of RCW 41.76.050).

Further, employers are also precluded from even *monitoring* employees' private union activities. A public employer violates the law if it engages in or creates the impression of surveillance of employees' union-related or organizing activities. *Pub. Employees Relations Comm'n v. City of Vancouver*, 107 Wn. App. 697, 707, 33 P.3d 74 (2001). Employers are also prohibited from questioning employees about their union activities or sympathies. *City of Tacoma*, Decision 6793-A (PECB, 2000) ("Employer interrogation of individuals about protected union activities has long been held to constitute an interference violation.").

Moreover, employees enjoy a "union privilege" that protects the privacy of their communications about organizing activity, reinforcing the notion that public employees' union activities are outside the scope of their employment. In fact, allowing an employer to access a union's records and internal communications would "be inconsistent with and subversive of the very essence of collective bargaining." *Berbiglia, Inc.,*

233 NLRB 1476, 1495 (1977).[2] The confidential nature of engaging in union activities protects against the potential "chilling effect" that accompanies disclosure of such activity to the employer. *National Tel. Directory Corp.*, 319 NLRB 420, 421 (1995). *See also Pacific Molasses Co. v. NLRB Regional Office # 15*, 577 F.2d 1172, 1182 (5th Cir. 1978). It was perhaps in recognition of this very concept that the UW explicitly kept faculty department chairs out of the process, rather than intrude upon the private nature of union organizing by having those chairs review the emails. CP 219.

All of this authority underscores the personal, confidential, and private nature of material on union organizing. In practice, when an employer becomes aware of a union's pre-certification organizing activities they often take steps to make organizing more difficult in an effort to keep unions from gathering sufficient support for an election. Permitting a third party to access union organizing communications via a PRA request would not only reveal which employees have shown interest in a union, opening them up to potential risk of retaliation, but also chill

[2]"[D]ecisions construing the National Labor Relations Act ("NLRA"), while not controlling, are persuasive in interpreting state labor acts which are similar or based upon the NLRA." *Nucleonics All., Local Union No. 1-369, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Washington Pub. Power Supply Sys. (WPPSS)*, 101 Wn.2d 24, 32-33, 677 P.2d 108(1984) citing *State ex rel. Wash. Fed'n of State Employees v. Board of Trustees*, 93 Wn.2d 60, 67-68, 605 P.2d 1252 (1980).

organizing by making it more difficult for organizers to securely contact potential members.

Other jurisdictions have recognized that communications regarding union organizing are not public records. For instance, the Michigan Court of Appeals reached this conclusion in determining the applicability of a similar statutory definition of "public record" to emails teachers sent using government email addresses in their personal capacity as members or leaders of their union. *Howell Ed. Ass'n v. Howell Bd. Of Ed.*, 287 Mich. App. 228, 246, 789 N.W.2d 594 (2010). The Court there found the union emails were akin to "an e-mail sent by a teacher to a family member or friend that involves an entirely private matter such as carpooling, childcare, lunch or dinner plans, or other personal matter" in that they are "wholly unrelated to the public body's official function." *Id.* at 240. The court reasoned that internal union communications "do not involve teachers acting in their official capacity as public employees, but in their personal capacity as HEA members or leadership," and that disclosure of those communications "would only reveal information regarding the affairs of a labor organization, which is not a public body." *Id.* at 246. The same reasoning applies here, and disclosure of the records in question would only reveal private and personal information about employees'

efforts to form a union, which is inherently unrelated to the performance of any government conduct.

In sum, the UW is legally precluded from directing, controlling, monitoring, or asking questions about faculty members' efforts to organize a union; it would be impossible, therefore, for employee-prepared documents about those organizing activities to be characterized as relating to the conduct of government or performance of government functions, or subject to public disclosure.

3. Documents About Union Organizing Activities Are Distinct From Those Relating to Labor Relations.

The private nature of union organizing is unique and distinct from other activities in which a public employee may participate to administer an established collective bargaining relationship. As explained, employers are statutorily precluded from interfering with the former, but must necessarily participate in the latter. Communications and documents regarding organizing efforts are inherently private, whereas communications between an employer and a certified labor organization may relate to the conduct of government and thus constitute disclosable interaction with the employer.

Undoubtedly, there are many records and communications relating to unions that *would* fall within all three prongs of RCW 42.56.010(3).

For example, records of employees of UW's Labor Relations Department that involved those employees acting in their proprietary labor relations capacity would likely qualify as public records. Such records could include communications with or about a union, performed in an official capacity.

Communications by union members and officials could also pertain to the conduct of government so as to constitute public records. When a worker represented by a certified union files a grievance, for instance, alleging an employer violation of a collective bargaining agreement that was negotiated between the union and the employer, or submits a proposal in collective bargaining negotiations, that communication involves government conduct in its proprietary capacity, including the ongoing administration of a relationship between the union and the employer. This is a far cry from private communications between a union and employees regarding early stages of union organizing. Further, none of the considerations for protecting the intrinsically private nature of communications amongst employees about whether and how to organize are implicated in such a situation. This distinction was recognized by the parties in *Howell,* and the union in that case agreed that communications between the employees who were also union officials and the *administration* could be disclosed, while objecting to the disclosure of

communications between employees and the union. 287 Mich. App. at 233.

Contrary to Freedom Foundation's argument, this distinction between public records regarding interaction with a state employer and private records regarding internal deliberations and organizing aligns with this Court's ruling in *Confederated Tribes of Chehalis v. Johnson*, 135 Wn.2d 734, 958 P.3d 260 (1998). There, this Court found that State Gambling Commission records of contributions tribes must pay pursuant to tribal-state compacts related to government conduct and constituted public records because they pertained to the Gambling Commission's functions: negotiating, renegotiating, and enforcing those compacts on behalf of the citizens of Washington. *Id.* at 747-48.

Applied here, *Confederated Tribes* would permit the release of information regarding only interactions between management and labor as part of labor relations at the UW. Just as documents regarding tribes' payments to the Gambling Commission concerned how the Commission negotiated and enforced compacts, documents regarding negotiations, grievances, and dues deductions pertain to the UW's relationships with unions representing its employees. However, the Court in *Confederated Tribes* did not go so far as to say records of tribes' *internal* deliberations regarding its compacts with the State would be subject to public

disclosure; only their actual interactions and records of payment fell within the PRA's scope. The documents requested here do not concern the UW's labor relations as a government employer; they concern its employees' internal deliberations about whether and how to organize a union. *Confederated Tribes* is thus inapposite and in no way compels disclosure of employees' private union sentiments and organizing tactics.

Similarly, the Foundation relies upon *Oliver v. Harborview Med. Ctr.*, to argue that the documents relate to a government function, but the reasoning of that case actually reinforces the distinction between private union organizing activities and documents related to administering a collective bargaining relationship. 94 Wn. 2d 559, 618 P.2d 76 (1980). In *Oliver*, this Court held that a patient's request for her own medical records required disclosure because the records contained information regarding "administration of health care services, facility availability, use and care, methods of diagnosis, analysis, treatment, and costs, all of which are carried out or related to the performance of governmental or proprietary function." 94 Wn.2d at 566. Put another way, the patient's medical records satisfied the "government conduct" prong of the definition of a "public record" because they concerned a hospital's performance of its function.

In contrast, the documents the Foundation requests here in no way pertain to the UW's performance of services or its functions as a university. The search terms prescribed in the Foundation's request virtually guarantee that any items produced would deal with issues related to potential employee organizing. Not only is the UW not in the business of employee organizing, as explained above, the UW is necessarily precluded from influencing or monitoring such efforts in any way. *See Yakima Police Patrolmen's Ass'n*, 153 Wn. App. 541 (an employer commits an "interference" violation when its conduct may reasonably be perceived by employees as a threat of reprisal or force or promise of benefit deterring them from pursuing lawful union activity.).

While some union-related documents would likely be subject to disclosure, the nature of the requests here is to target documents that are necessarily unrelated to the conduct of government and thus squarely outside the bounds of the *Confederated Tribes* and *Oliver* decisions. In each of those cases, a government entity was required to produce records related to the performance of its functions. In contrast, here, a public employer has been asked to disclose records both unrelated to the performance of its functions and to which, by law, it has not been privy.

B. Constitutional Privacy Safeguards Prohibit the Release of the Documents at Issue.

Even were it not for the fact that the requested documents are not "public records," because they are unrelated to the conduct of government, disclosure would still be prohibited because disclosure of the documents would infringe upon employees' constitutional right to privacy under Article I, Section 7 of the Washington Constitution. "The state constitution may exempt certain records from production because it supersedes contrary statutory laws." *Washington Pub. Employees Ass'n v. Washington State Ctr. for Childhood Deafness & Hearing Loss*, 1 Wn.App 2d 225, 404 P.3d 111 (Wash. Ct. App. 2017), *review granted,* 190 Wn.2d 1002, 413 P.3d 15 (2018).

Article I, Section 7 of the Washington Constitution provides that, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." That provision goes beyond the bounds of the Fourth Amendment to the United States Constitution, and "is grounded in a broad right to privacy." *State v. Chacon Arreola*, 176 Wn. 2d 284, 291, 290 P.3d 983 (2012).

An assessment of a violation of the right of privacy under Article I, Section 7 turns on whether the State has unreasonably intruded into a person's private affairs, *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984) (citing *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1100 (1980)). To make that determination, courts look to the nature and extent

of the information that may be obtained as a result of the government conduct and the historical treatment of the interest asserted. *See State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014). Specifically, courts examine: (1) the historical treatment of the interest asserted and, if historical analysis does not show an interest is protected, (2) whether the expectation of privacy is one that a citizen of Washington is entitled to hold. *WPEA*, 1 Wn.App. 2d at 233. The second prong includes a review of the nature of the information that may be obtained as a result of the governmental conduct and the extent that the information has been voluntarily exposed to the public. *Id*. Here, both prongs lead to the conclusion that the requested documents are protected from disclosure by the constitutional right to privacy.

As for the first prong, communications amongst employees regarding union activity have long been treated as private and protected from public view. As discussed above, employers are not permitted to monitor such communications. Likewise, internal union communications have historically been protected from disclosure in judicial and administrative proceedings.

In the private sector, the NLRB has repeatedly held that internal union communications are not subject to subpoena. *See e.g. Berbiglia, Inc*., 233 NLRB 1476, 1495 (1977) (revoking subpoena seeking "a wide-

ranging examination of the Union's records, including communications between the Union and its members" because to do so "would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members."); *National Tel. Directory Corp.*, 319 NLRB 420 (1995) (revoking subpoena for union notes that would reveal the identities of supporters based on employees' interest in confidentiality in that information).

State courts have reached the same conclusion. *See Peterson v. State*, 280 P.3d 559 (Alaska, 2012) (union-relations privilege extends to communications made in confidence between employee and union); *Seelig v. Shepard*, 578 N.Y.S.2d 965 (1991) (labor relations privilege protects communications between union and members; "If unions are to function, leaders must be free to communicate with their members about the problems and complaints of union members without undue interference.").

Under the second prong, employees enjoy a reasonable expectation of privacy as to their internal communications about union organizing. The nature of the information, as previously described, is inherently personal and unrelated to government conduct. Employees have every reason to believe that such personal communications would remain private. Even when using employer email systems, communications

amongst employees and labor organizations cannot be said to have been voluntarily exposed to the public.

In addition to protecting communications about efforts to organize a union, Article I, Section 7 also protects documents from being disclosed to the extent those documents contain personal information about employees. The Court of Appeals recently recognized that:

> Public disclosure of state employees' full names associated with their corresponding birthdates reveals personal and discrete details of the employees' lives. … Once disclosed to the public domain, these employees would potentially be subject to an ongoing risk of identity theft and other harms from the disclosure of this personal information, such as their personal addresses and personal telephone numbers. A citizen of this state would reasonably expect that personal information, such as the public disclosure of his or her full name associated with his or her corresponding birthdate, that would potentially subject them to identity theft and other harms, would remain private.

WPEA, 1 Wn.App. 2d at 234. To the extent any of the thousands of pages set to be disclosed in this case contain sensitive personal information, Article I, Section 7 prevents their release.

V. CONCLUSION

The documents at issue are not "public records" under the PRA because they do not concern the conduct of government or the performance of government functions, which is evidenced in part by the fact they were not created within the scope of employment. Rather, the

emails and records the Freedom Foundation seeks in this case are not subject to disclosure via the PRA, as employee organizing efforts are inherently personal and private and are unrelated to government conduct. Further, constitutional privacy safeguards prohibit the release of documents concerning union organizing and documents containing employees' personal information. *Amici Curiae* urge this Court to affirm the decision of the Court of Appeals in permanently enjoining UW from releasing the requested documents.

RESPECTFULLY SUBMITTED this 29th day of March, 2019.

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CERTIFICATE OF SERVICE

I, Esmeralda Valenzuela, declare under penalty of perjury under the laws of the State of Washington that on March 29, 2019, the foregoing Brief of Amicus Curiae was filed with the Washington State Supreme Court using the Court's e-filing system, which will automatically provide notice to all required parties.

Executed this 29th day of March, 2019 in Seattle, WA.

Esmeralda Valenzuela

BARNARD IGLITZIN & LAVITT

March 29, 2019 - 3:30 PM

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